IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06/08/2003

Coram

The Honourable Mr.Justice A.S.VENKATACHALAMOORTHY
and
The Honourable Mr.Justice S.SARDAR ZACKRIA HUSSAIN

Criminal Appeal No.339 of 2001

1. Kandan @ Mayil Kandan

2. Murugesan ... Appellants

-Vs-

#State by Inspector of Police,
Samayapuram Police Station,
Tiruchirapalli
(Crime No.186 of 1997) ... Respondent

This criminal appeal is filed against the conviction and sentence imposed on the appellants/accused by the learned Principal Sessions Judge, Tiruchirapalli by his Judgment dated 22.3.2001 in S.C.No.148 of 1999.

!For Appellants : Mr.A.Padmanabhan

^For Respondent : Mr.V.M.R.Rajendran
Addl.Public Prosecutor

:J U D G M E N T

A.S.VENKATACHALAMOORTHY, J.
The appellants/accused faced trial in S.C.148 of 1999 on the file of learned Principal Sessions Judge, Tiruchirapalli for a charge under Section 302 read with 34 I.P.C. for causing the death of the deceased by name Raja at about 7.30 p.m. near Pullambadi canal on 5.5.1997. The trial Court found them guilty as charged and sentenced them to undergo imprisonment for life as well as imposed a fine of Rs.1,000/- each. The said Judgment is under challenge in this appeal.

2. The case of the prosecution in brief as found from the evidence let in is as follows.
(a) The accused are brothers. PW-4 Singaram is the brother of deceased Raja.
(b) The second accused was one of the partners of Kalaimagal Lucky Center, a Lottery shop in Samayapuram Bazaar and the deceased was an

employee in the said shop. There was theft of lottery tickets to the tune of Rs.10,000/- from the said shop and the proprietors of the shop suspected the deceased. On 4.5.1997 a Panchayat was held in this regard and in the said Panchayat it was decided that the deceased must make good the loss. However, the deceased Raja refused to pay any amount as per the direction of the Panchayat, since according to him he had not committed any theft of lottery tickets.

(c) On 4.5.1997 at about 10.00 a.m., the first accused went to the house of the deceased and demanded for payment and at that time the brother of the deceased PW-4 was also present in the house. The deceased told the first accused that he had no money to pay him.

(d) On the fateful day, i.e., on 5.5.1997 at about 7.30 p.m., Pws.1 and 3 were in their respective houses near Padithurai in Samayapuram. When they heard some crying noise from Pullambadi new canal, they rushed there. There they found the deceased Raja taking a dip in the water of the canal. They brought him out of the canal and found that his dresses were partly burnt. They noticed that he had also sustained extensive burn injuries. When questioned, he told them that the appellants set him to fire since he had refused to pay the amount as per the decision of the Panchayat. By that time PW-4 also arrived at the scene of occurrence so also others and to them also the deceased told as to what had happened.

(e) Pws.1, 3 and 4 then took the deceased to Samayapuram Police Station and before PW-10 the then Head Constable at the Police station the deceased Raja made a statement Ex.P-9. On the basis of the said statement, crime No.186 of 1997 under Section 307 I.P.c., was registered and printed F.I.R. Ex.P-10 was prepared and the same was despatched to the Judicial Magistrate and copies thereof to superiors.

(f) PW-7 is the Doctor, who saw the deceased first at about 9.10 p.m. The Doctor noted that the deceased had sustained burn injuries to the extent of 90%. To the Doctor he told that five known persons poured kerosene and set fire to him at 7.00 p.m. on 5.5.1997 near Samayapuram Puduvaikalkarai.

(g) PW-11 was the Judicial Magistrate No.II, Tiruchirapalli at the relevant time. At about 10.15 p.m., he received a requisition from the Government Hospital to come and record the dying declaration of the injured Raja. Immediately PW-11 rushed to the hospital and reached there at 10.25 p.m., saw the injured Raja and after ascertaining that he was conscious and capable of understanding the questions and giving answers, recorded the dying declaration. To PW-11, the deceased informed that he was beaten by A-1 and four others and that A-1 tied his hands and four others poured kerosene and set fire to him.

(h) PW-14 is the Inspector of Police, who received copy of F.I.R. in crime No.186 of 1997 and immediately went to the scene of occurrence and inspected the scene. On the next day i.e., on 6.5.1997 at about 7.00 a.m., he prepared Ex.P-2 observation mahazar and Ex.P-17 rough sketch in the presence of witnesses. From the scene he seized MO-3 partly burnt match stick, Mo-4 kerosene stained earth, MO-5 ordinary earth, MO-6 Black colour plastic Can cover in the presence of witnesses. He examined Ganesan, Rengaraj, Pandiaraj and others and recorded their statements. At about 4.00 p.m., near the arch in Samayapuram, arrested A-1 and enquired him. On arrest, he came forward and gave a voluntary confession statement. A-1 in

that statement stated that if taken, he will show the place of occurrence so also the kerosene Can, which he had thrown and also the place where he had kept the match box. A-1 did so and the Plastic Can MO-7 and match box Mo-8 were seized under Ex.P-5 mahazar in the presence of witnesses. On 7.5.1997 at about 11.30 a.m. the Inspector of Police arrested A-2 near the petrol bunk in Kollidam. The Inspector then examined various witnesses on the following days.

(i) PW-13 Inspector of Police of Manachanallur Police Station continued the investigation since PW-14 was away on other duty. On 9.5.1 997 the injured Raja died in spite of the treatment given to him. On coming to know about the death of Raja, he altered the crime into one under Section 302 I.P.C., and prepared Ex.P-15 printed F.I.R and sent the same to the Judicial Magistrate. PW-13 then proceeded to the hospital and conducted inquest over the body of the deceased and prepared Ex.P-16 inquest report in the presence of the Panchayatdars. Then he sent Ex.P-7 requisition to the Doctor to conduct post mortem.

(j) PW-8 is the Doctor who conducted post mortem on the body of the deceased pursuant to the requisition Ex.P-7 made by the Inspector of Police. The post mortem was commenced at 12.30 p.m. on 9.5.1995 and Ex.P-8 is the post mortem certificate. In the said certificate, the Doctor has noted the following,

"External Examination

Extensive burns with pustular and slough involving Head with singing of Hair, Face, neck, front and back of thorax, front and back of abdomen, (Rt) arm, (Rt) forearm, Scrotum, (Rt) leg front and back. No other external Injuries.

Internal Examination

Head: Scalp: Burnt Hair, Skull: - No fracture skull. Membranes- Intact, Brain- Pale NAD.

Neck: Hyoid intact.

Thorax:

No fracture ribs both sides.

Both side pleura intact.

Both lungs pale, congested.

Trachea coated with tarry material.

Heart: Pale, dilated.

Abdomen: Stomach Pale. Contained brown liquid 100 ml.

Liver: Congested; Pale.

Spleen: Pale; NAD.

Both Kidneys: Pale; NAD.

Scrotum: NAD"

The Doctor had opined that the deceased would have died of burn, shock and septicemia and the death would have occurred about 8 to 12 hours prior to commencement of post mortem.

(k) PW-14, who resumed duty, made efforts to trace the other three accused but however he could not succeed. PW-14 then proceeded with further investigation, examined witnesses on various dates and recorded their statements. Ex.P-14 is the Chemical analysis report. The Investigating Officer, after completing the investigation, filed his final report.

3. When questioned under Section 313 of Code of Criminal Procedure, both the accused pleaded that they have nothing to do with the

occurrence and they have been falsely implicated in this case.

4. In brief, the case of the prosecution is that since the deceased refused to pay the money as per the Panchayat, the accused and three others took him to the southern bund of new vaikal in Pullambadi and that A-1 beat him while A-2 tied his hands and thereafter, A-1 poured kerosene and set fire. None witnessed the occurrence and Pws.1, 3 and 4 are the witnesses who reached the place immediately after the occurrence and to whom the deceased narrated as to what had happened. These witnesses also did not see the accused at the scene of occurrence. Hence the prosecution relies only on the dying declaration made by the deceased. They are,
(a) The dying declaration made by the deceased to PW-11 Judicial Magistrate at 10.25 p.m. on 5.5.1997 at the Government Hospital.
(b) The complaint Ex.P-1 given by the deceased to the Head Constable PW-10 at 8.00 p.m. on 5.5.1997.

(c) The evidence of PW-7, the Doctor at the Government Hospital to whom at 9.10 p.m. the deceased told about the occurrence.
(d) The evidence of Pws.1, 3 and 4 who arrived at the scene immediately after the occurrence and to whom the deceased told what had happened before their arrival.

5. The settled legal position is a dying declaration, if found reliable, can form the basis of conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. But, if in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case or circumstances coming to its notice, the Court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying declaration so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming a safe basis for conviction. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances. (Refer: 1993 SCC (Crl) 655 (Kundula Bala Subrahmanyam v. State of A.P.); (2001) 6 SCC 118 (Laxmi v. Om Prakash)).

6. Let us proceed to consider whether there are material contradictions or not amongst the dying declarations made by the deceased.

7. PW-11 was the then Judicial Magistrate No.II, Tiruchirapalli, who on receipt of requisition at 10.15 p.m. on 5.5.1997, proceeded to the hospital and reached there at 10.25 p.m. and recorded the dying declaration Ex.P-11. The learned Magistrate first put as many as six questions to the deceased to satisfy himself that the injured was conscious and capable of giving answers to the questions. He recorded the statement in the presence of Doctor, who has also certified that the deceased (patient) was conscious throughout. To the Magistrate, the deceased had told that at 7.00 p.m. on 5.5.1997, A-1 and four others took him to the bund of new vaikal in

Samayapuram and beat him. A-1 beat him and then tied the hands and remaining four poured kerosene and set fire and thereafter they ran away. It has to be noted that the presence of A-2 is not mentioned in the said statement. So also the overt act of pouring kerosene and setting fire have been attributed to all the four accused other than A-1.

8. The other dying declaration is Ex.P-9, which is a complaint given by the deceased to PW-10, the Head Constable at 8.00 p.m. on 5.5.1 997 in the police station. In the said complaint, he had stated that he was taken to the tank bund by A-1 and near the foot steps of the Canal, A-2 and A-3 and others were present. Then A-1 beat the deceased on the back and A-2 tied his hands and again A-1 poured kerosene on him and set fire. Pws.1, 3 and others came there and informed as to what had happened.

9. When we compare these two dying declarations, we find the following differences.
(a) In Ex.P-11 it is stated that the deceased was taken near the canal by A-1 and four others, but in Ex.P-9 it is stated that he was taken there by A-1.
(b) In Ex.P-11 the name of A-2 is not mentioned, whereas in Ex.P-9 it is mentioned.
(c) In Ex.P-11 it is stated that A-1 tied the hands, but we find in Ex.P-9 it is stated that it was A-2, who tied the hands.
(d) In Ex.P-11 it is stated that four persons other than A-1 poured kerosene and set fire. In Ex.P-9 it is stated that A-1 poured kerosene and set fire.
(e) In Ex.P-9 the deceased had stated Pws.1, 3 and 4 arrived immediately after the occurrence and to whom he narrated as to what had followed, but the same does not find a place in Ex.P-11.

10. Now let us proceed to consider the other two dying declarations viz., as to what the deceased told to the Doctor PW-7 and to Pws.1, 3 and 4 about the occurrence.

11. To the Doctor the deceased had told that five known persons poured kerosene and set fire and that is not the case in Ex.P-9 or Ex. P-11.
12. Coming to the evidence of Pws.1 and 3, we find they have deposed that the deceased had told them as if it was only two known persons who poured kerosene and set him to fire. But if we turn to the evidence of PW-4, we note that the deceased had told him that A-1 and A-2 had done so and that there were also two or three unknown persons present. It has to be pointed out that PW-4 is none else than the brother of the deceased. Thus, we find the statement made to Pws.1, 3 and 4 by the deceased is different from Ex.P-9 and Ex.P-11.

13. Let us proceed to consider some rulings of the Supreme Court at this juncture.
(a) In AIR 1965 SC 939 (Pompiah v. State of Mysore), the Court was considering two dying declarations. In that case, the deceased made declaration at the place where he had fallen down, which were recorded as

Ex.P-2 and P-1(a). Later, he was removed to hospital Kampli and there he made another declaration Ex.P-9. The Court pointed out the inconsistencies and declined to accept the prosecution case. The Court observed as under,
"In the instant case, the declarations recorded in Exs.P-2 and P-1(a) were made almost simultaneously and the declaration recorded in Ex.P-9 was made shortly thereafter. In Ex.P-2, Eranna named Pompiah and Hussaini only as his assailants, whereas in Exs.P-1(a) and P-9 he named not only Pompiah and Hussaini, but also Siddaiah and Rudramuni as his assailants. Now, his version that Siddaiah and Rudramuni attacked him has been found to be an afterthought. We thus find that a material and integral portion of the deceased's version of the entire occurrence is unreliable. The truthfulness of the dying declarations as a whole is not free from doubt. The prosecution case as a whole does not inspire confidence. ..." (Emphasis supplied)

(b) In the ruling reported in AIR 1993 SC 374 (Kamla v. State of Punjab), there were four dying declarations, out of which three to different Doctors and one to the Sub-Inspector of Police. In one dying declaration, the deceased named her mother-in-law while in the other she named both her mother-in-law and father-in-law. In the third one she had said that it might be that mother-in-law and father-in-law were the culprits. In the statement made before the Doctor she told it was an accident. We deem it necessary to quote the relevant portions from the said judgment,
"(5) It is well-settled that dying declaration can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests. (vide Khushal Rao v. State of Bombay, 1958 SCR 55 2: (AIR 1958 SC 22)). The ratio laid down in this case has been referred to in a number of subsequent cases with approval. It is also settled in all these cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances. .....
(8) .... A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declarations they should be consistent particularly in material particulars. ..."
The Court held that the prosecution has not proved its case.

(c) In yet another ruling reported in 1999 (4) Crimes 90 (SC) (Dandu Lakshmi Reddy v. State of A.P.), the Court pointed out that there should not be any inherent improbability in a dying declaration so also there should not be any material contradiction. In that case, the deceased gave a declaration to the Magistrate mentioning that the occurrence took place at 6.00 a.m. when she was sleeping when her mother-in-law and husband both poured kerosene on her and lighted match stick and set her to fire. But

however, in the statement given to the Sub-Inspector of Police, she had stated that when she was lighting the stove at 6.00 a.m. her husband caught hold of her and mother in law poured kerosene on her and she asked her son to set fire and that is how the occurrence took place. The Court pointed out that the Court while examining the dying declaration must satisfy its judicial conscience and that the sphere of scrutiny of dying declaration is a restricted area and that the court cannot afford to sideline such a material divergence relating to the very occasion of the crime. The Court held that the prosecution had not established its case beyond all reasonable doubt. We hereunder extract the relevant portions from the said judgment,

"11. In view of the impossibility of conducting the test on the said version with the touchstone of cross-examination we have to adopt other tests in order to satisfy our judicial conscience that those two dying declarations contain nothing but truth.
12. First among such tests is to scrutinies whether there are inherent improbabilities in that version. We are unable to detect any such improbability inherent therein. The next test is whether there is any inherent contradiction therein. In that scrutiny we came across one material contradiction as between the two dying declarations regarding the context in which deceased caught fire. Ext.P-14 shows that she was set fire to when she was lighting to stove for preparing the coffee. .....
In Ext.P-11 (which is a dying declaration given to the judicial Magistrate of 1st class) the context stated by the declarant was altogether different. The relevant portion is extracted below:-
"My mother-in-law's name is Narayanamma, my husband's name is Dandu Lakshmi Reddy. In the morning at 6.00 a.m. when I was sweeping, my mother in law Narayanamma and my husband Laxmi Reddy both poured kerosene on me, lit the match-stick and set me to fire."
13. .....
Thus the High Court has sidelined such a noticeable discrepancy looming large as between the two different statements made by the same person. When the sphere of scrutiny of dying declaration is a restricted area, the court cannot afford to sideline such a material divergence relating to the very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course."
(emphasis supplied)

14. Applying the various principles laid down by the Supreme Court of India to the facts of this case, we have no hesitation to hold that there are material contradictions amongst various dying declarations and it is totally unsafe to rely on anyone of them and convict the accused.
15. In the result, the criminal appeal is allowed. The conviction and sentence imposed on both the appellants/accused by the learned Principal Sessions Judge, Tiruchirapalli by his Judgment dated 22.3.20 01 in S.C.148 of 1999 are hereby set aside. Both the appellants/ accused are acquitted of the charge framed against them. They shall be set at liberty forthwith if they are not required in connection with some other cases. The

fine amount paid by the appellants/accused, if any, shall be refunded to them.

vr

To
1. The Principal Sessions Judge, Tiruchirapalli
2. The Inspector of Police, Samayapuram Police Station
(Crime No.186 of 1997)
3. The Superintendent of Police, Tiruchirapalli
4. The District Collector, Tiruchirapalli
5. The Superintendent of Central Prison, Tiruchirapalli
6. The Public Prosecutor, High Court, Madras
7. The Director General of Police, Madras.

?In the High Court of Judicature at Madras

%Dated: 15/09/2003

*C o r a m

The Honourable Mr.Justice K.GOVINDARAJAN

+Writ Petition No.24556 of 2003
and
Writ Petition No. 24559 of 2003

#Suresh Manohar ... Petitioner in W.P.24556/03

Prof.I.Elangovan ... Petitioner in W.P.24559/03

-Vs-

1.The State of Tamil Nadu
Rep., by the Secretary to Govt.
Public Dept., Fort St. George,
Chennai.600 009

2.The Director of Collegiate Education,
College Road,
Chennai.600 006

3.Voorhees Colleges rep., by the
Rt. Rev. Bishop, Vellore .. Respondents, in both
the W.Ps.

Writ Petitions filed under Article 226 of the Indian Constitution

praying for the issue of a writ of certiorarified mandamus to quash the order of the 2nd respondent in RC.No.28843/E1/2003 dated 26.7.2003 and the consequential order of the 3rd respondent dated 28.7.2003 and to direct the respondents to reinstate the petitioners in service with all consequential benefits.

!For Petitioners : Mr.K.Chandru,
Senior Counsel, for
Mr.R.Yashod Varadhan

^For Respondents : Mr.V.R.Rajasekaran,
Spl.G.P.

:C O M M O N O R D E R

The petitioners have challenged the order of suspension issued on 28 .7.2003, by the 3rd respondent.

2.The petitioner in W.P.No.24556/2003 is working as a Selection Grade lecturer in Mathematics and the petitioner in W.P.No.24559/2003 is working as a Selection Grade lecturer in English at the 3rd respondent college which is an aided institution. The petitioners were suspended from service on 17.7.2003 by the 3rd respondent, as they have not attended duty on 3.7.2003. Subsequently, a perusal of the explanation given by the petitioners and other persons who wsere suspended along with the petitioners, the order of suspension dated 17.3.2003 was revoked. Thereafter, under the impugned order dated 28.7.2003, referring to the proceedings of the second respondent, dated 26.7.2003, it was informed to the petitioners that they could not be reinstated and so they are directed not to sign attendance register and not to engage classes till further orders. Challenging the said proceedings, the petitioners have filed the above writ petitions.

3. Learned Senior Counsel appearing for the petitioners submitted that though the 3rd respondent-college is an aided institution, the powers can be exercised either by the Government or by the 3rd respondent only, as contemplated under the provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976, hereinafter called 'the Act', and the Rules made thereunder. Referring to Sec.10 of the Act, learned Senior Counsel submitted that power to give direction, is only to implement the provisions of the Act and not to exercise the powers contrary to the scope of the Act. Referring to Sec.19 of the Act, learned Senior Counsel further submitted that the order of suspension can be made only for two months and if for any reason, it can be extended for further two months, if in the opinion of the competent authority, the enquiry should not be completed within the said period of two months, that too, for the reasons directly attributable to a teacher or such person. In effect, the learned Senior Counsel submitted that the 2nd respondent-director has no jurisdiction to give direction to the 3rd respondent to permit the

petitioners to work in the 3rd respondent-college. The power given under the Act to give directions cannot be traced to issue the direction now impugned in these writ petitions.

4. Mr. V.R.Rajasekaran, learned Special Government Pleader, appearing for the respondents submitted that the Government is paying the aid to the 3rd respondent-college and so the Government is interested in the discipline which has to be maintained in the said college itself. In view of the fact that the petitioners have been arrested and kept in jail, such a direction was given not to permit the petitioners to work in the 3rd respondent-college, until further orders. According to him, such a direction is in exercise of the powers conferred under the provisions, namely, under Sec.10 of the Act and that too in the interest of justice of the 3rd respondent-college, and in general, in the interest of public.

5. In the present case, originally, the petitioners were suspended, along with others, on 17.7.2003. The said order was passed by the Principal-in charge of the 3rd respondent-college. The petitioners and other members of the staff gave explanation and requested to revoke the suspension. On satisfying with the said explanation given by the petitioners and other staff, the order of suspension was revoked on 18.7.2003. Thereafter, the 2nd respondent in the proceedings dated 2 6.7.2003, directed the Secretaries of the Government aided colleges to consider the representation for suspension of the orders issued by them in respect of the employees/teachers without prejudice to the disciplinary proceedings pending against them, and while considering the same, the said Secretaries have been requested to contact the concerned police authorities and obtain the list of names arrested and F.I.R., lodged against them. The 2nd respondent further specifically directed the Secretaries not to reinstate the employees whose names find place in the said list. On receipt of the said letter by the 3rd respondent-college, the impugned order dated 28.7.2003 was passed informing the petitioners that they should not be reinstated, and directing them not to sign the attendance register and not to engage classes till further notice in that regard.

6. So, the question now to be decided is whether the 2nd respondent is having power to give such a direction and whether the impugned order of the 3rd respondent passed on that basis, can be sustained in law.

7. As contemplated under Sec.14(1)(c) of the Act, the college committee is having power to take disciplinary action against the teachers or other persons of the private college. Sec.19(3) of the Act deals with suspension, pending enquiry. In view of the above said provisions of the Act, the college committee alone can suspend a teacher pending enquiry of grave misconduct within the meaning of the code of conduct prescribed under sub-section(1) of Sec.18 of the Act as contemplated therein. But the said suspension cannot be kept pending for more than two months from the date of such suspension. But, the same can be extended for a further period of two months for the reasons mentioned in the proviso to Sec.19(3)(b) of the Act. So, it is clear that a teacher of a private college can be suspended only by a college committee and also only in accordance with Sec.19(3) of the Act. Rule

13 of the Tamil Nadu Private Colleges (Regulation) Rules, 1976, hereinafter called 'the Rules', deals with the procedure to be followed in the matter of suspension.

8. In the present case, as stated already, though the petitioners were suspended on the basis of misconduct after getting explanation from them and on satisfying with the same, the said suspension was revoked by the order dated 18.7.2003. Though the Principal-in charge has no jurisdiction to pass an order of suspension and also passed the order revoking the suspension, I am not going into the said question, as the said issue need not be decided in this case. But the fact remains, accepting the reasons given by the petitioners, the order of suspension was revoked on 18.7.2003 and thereby the petitioners are entitled to work in the 3rd respondent-college, even if disciplinary proceedings are pending. But for the order of the 2nd respondentdirector, the petitioners should have continued to attend the 3rd respondent-college and conduct classes. So, on the basis of the order of the 2 nd respondent-director, the Chairman of the college council of the 3 rd respondent-college passed the order directing the petitioners not to attend the classes and sign the attendance register.
9. First of all, the said order passed by the 2nd respondentdirector, preventing the petitioners from attending classes, cannot be sustained, without any valid order of suspension, dismissal or removal. In the present case, no such order is passed so as to prevent the petitioners from attending the 3rd respondent-college and conducting classes. There is no provision under the Act and the Rules to prevent the teachers from discharging their duty without passing appropriate orders as contemplated under the Act. Such order could be only an order of suspension, dismissal or removal. In the present case, no such orders are in existence and so the impugned orders on that ground has to be set aside.

10. Even if the impugned order has to be construed as an order of suspension, the same cannot be sustained as the said order is not passed by the college committee but only by the Chairman of the Governing Council Board. When the provisions are made under the statute to regulate the service conditions in a particular way, the thing must be done in that way, or not at all, and order can be passed only by the authority competent and not by any other authority. In the decision in Valliappan v. The Madras Seva Sadan Higher Secondary School, 199 5-II M.L.J. - 488, the learned Judge while dealing with the correctness of the order of suspension of a teacher in a private school, has held as follows:-

"11. The statutory scheme therefore, is that the power to take disciplinary action against teachers and other employees of the institution is vested in the school committee. The power to suspend being a power which is incidental to the taking of such disciplinary action, has also to be held to be a power which is vested in the school committee and not in any other individual. Suspension can only be made when the person against whom an enquiry is contemplated has committed not any misconduct, but gross misconduct in relation to the Code of conduct prescribed under Sub-sec.(1) of Sec.21 of the Act.

12. The period of suspension should not normally exceed a period of two months and if suspension is sought to be continued beyond that period, the approval of the competent authority is required. Thus, it is clear that suspension effected against the provisions of the Act and such suspension must be effected by the authority competent, only when an enquiry is contemplated into gross misconduct.

13. The person paced under suspension suffers certain disadvantages. The impact of such suspension is that he will cease to have the right to perform his normal official work. In monetary terms, his emoluments get reduced substantially, as he would only be entitled to subsistence allowance, the amount of which is much less than his normal salary. This is yet another reason why the power to suspend should be regarded as one which is incidental to the taking of the disciplinary action, even if it cannot be held to be a penalty. The Act has vested the power in the school committee and not in the Secretary of the school committee, who is only required to act for and on behalf of the committee, and on the basis of the resolution passed in the school committee, Sec.16 of the Act, specifies the powers and functions of the secretary of the school committee with reference to the rules, that may ;be framed under the Act. The Rules so framed clearly shows that the primary duty of the Secretary is to act on the basis of the resolutions passed at the meeting of the school committee. The action of the Secretary can only be for and on behalf of the school committee to the extent authorised by the committee.

14. Having regard to the statutory scheme, it must be held that the action of the Secretary in suspending the petitioner was one which the secretary was not authorised to do under the terms of statute. The Secretary has no independent power to suspend the teachers or other persons, even when an enquiry is contemplated into a misconduct.

15. Learned counsel for the respondent school submitted that a certain amount of flexibility is essential in internal management, and a rigid view of the statute is not warranted, having regard to the nature of the functions required to be performed by the Secretary. This argument though attractive, cannot be accepted, in view of the statutory scheme, which vests this power in the school committee. The powers of the Secretary are limited by the Rules framed, and the statutory provisions do not empower the Secretary to suspend the officials or the teachers pending enquiry. No rule also has been framed to vest such power in the Secretary.

16. As regards the ratification said to have been done, once it is held that the Secretary of the school committee had no power to suspend and that power was vested only in the school committee, it must follow that in the absence of express authority being conferred on the Secretary to suspend, the suspension effected would be void ab initio. Once that suspension has been declared as void, it must be follow that the school committee should not ratify such a void act. The principle laid down by the Supreme Court in the case of The Marathwada University v. Seshrao Balwant Rao Chavan, A.I.R. 1989 S.C. 1582, would be attracted, considering the fact that the Secretary of the School committee is required to function in accordance with the Statute,

unlike the Board of Directors of the Company, which functions with a considerable degree of freedom, in matters relating to its internal management, and wherein the general body of shareholders have the necessary authority to ratify such actions of the Board, as the general body of the shareholders may regard such actions as necessitating ratification,even though such action was initially not authorised.

17. As observed by the Supreme Court in the case on Marathwada University the principles of ratification apparently do not have any application in regard to the exercise of powers conferred under the statutory provisions. The statutory authority cannot act beyond the power conferred and any action without power, no legal validity, it is ab initio void and, cannot be ratified."

11. In this case, from the impugned orders, I am able to see that the college committee has not taken a decision, and passed orders suspending the petitioners. Even on that ground and also on the basis of the above said judgment, the impugned order dated 28.7.2003 cannot be sustained.

12. Though the Government is having power to give a direction under the provisions of the Act, such a direction or instruction can be given only on the subjects where if the provisions of the Act or the Rules made thereunder do not cover the field and with respect to the area where such power is given.

13. In the decision in Hira Devi v. Dist. Board, Shahjahanpur, AIR 1 952 S.C. 362, it is held as follows:-

"14. We are afraid we cannot agree with this line of reasoning adopted by the High Court. The defendants were a board created by statute and were invested with powers which of necessity had to be found within the four corners of the statute itself. The powers of dismissal and suspension given to the Board are defined and circumscribed by the provisions of Ss. 71 and 90 of the Act and have to be culled out from the express provisions of those sections. When express powers have been given to the Board under the terms of these sections it would not be legitimate to have resort to general or implied powers under the law of master and servant or under S. 16, U.P. General Clauses Act. Even under the terms of S.16 of that Act, the powers which are vested in the authority to suspend or dismiss any person appointed are to be operative only "unless a different intention appears" and such different intention is to be found in the enactment of Ss. 71 and 90 of the Act which codify the powers of dismissal and suspension vested in the Board. It would be an unwarranted extension of the powers of suspension vested in the Board to read, as the High Court purported to do, the power of suspension of the type in question into the words "the orders of any authority whose sanction is necessary. ...."

14. It is also held in the decision in State of Sikkim v. Dorjee Tshering Bhutia, AIR 1991,S.C. 1933, that the executive power of the State under Art.162 of the Constitution cannot be exercised in the field which is

already occupied by the laws made by the legislature and any order, instruction or notification issued in exercise of executive power of the State which is contrary to the statutory provisions is without jurisdiction and is a nullity.

15. Even in the recent decision of the Apex Court in I.I.T.T. College of Engineering vs. State of Himachal Pradesh and others, 2003 A.I. R. S.C.W. - 4053, while considering the correctness of the order of the High Court of Himachal Pradesh appointing an Administrator to manage the private college, the Apex Court found that however laudable object behind the steps taken by the High Court, it cannot be justified under law, as there is no provision either under the A.I.C.T.E. Act or the Himachal Pradesh Education Act or the University Act, permitting the authorities to take over the management of the institution.

16. While considering the scope of the Government Orders regarding the appointment through employment exchange, this Court in the decision in PSG College of Arts and Science v. University Grants Commission, 2001(4) CTC 121, held that the provisions under the Tamil Nadu Private Colleges (Regulation) Act, 1976 deals with the procedure to be followed in making appointment in the colleges and the college committee is having obligation to appoint teachers according to the method as contemplated under Rule 11 of the Rules and so the rejection to approve the appointment on the basis of the Government Order to the effect that the selection should be from the list sent by the employment exchange, cannot be countenanced, as the college is entitled to call for the names from the open market also.

17. The argument advanced by the learned Special Government Pleader that since the Government is paying aid, they are entitled to issue any direction, cannot be sustained. The petitioners are not Government Servants, though they have to be deemed as public servants, their rights and duties are regulated by the Act and the Rules made thereunder. The Act has conferred on the State Government certain powers and control and supervision. No specific power is given to the Government to prevent a teacher from discharging their work if they are entitled otherwise. The Government is not master or employer of teaching staff, as they are having only controlling power under the Act. This view of mine is supported by the decision in Papanasam labour Welfare Association HS School v. Chief Educational Officedr, 1998(III) CTC 753 in which it is ;held as follows:-
"14. While considering the scope of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973, it is clear that the Government has got only a controlling power over the Institution and the Act regulates the power that has to be exercised. From the very heading of the enactment, it is clear that it is the Management that has established the school, and has also appointed the staff according to their qualification. It takes disciplinary proceedings and also pays the salary. The activities of the Management and also the smooth functioning of the school are regulated by the provisions of the Act. The Government is ;not the Master, nor the Employer. The Employer is the School of Management, who pays the salary to the staff. The Employer has the duty to pay salary, though the amount is paid by the Government. It is an action on the part of the employer to have a control over his

employee/employees. It is the School Committee which is reasonable for the smooth functioning of the school. Under Section18 of the Act, the School Committee is having the power to carry on the general administration of the private school. It has the power to appoint teachers and other employees of the private school, fix their pay and allowances and define their duties and the conditions of their service and to take disciplinary action against teachers and other employees of the private school. Even if the Management gets a grant, that is also on the basis of the statement of the Secretary of the School Committee. The Government is only extending financial assistance the actual control is only with the Management. When we go by the Rules, the right of the Management is recognised and that it is said that the statement must be prepared by the Secretary and signed both by the Secretary and the Headmaster, and the Bill is also handed over to the Secretary, who encashes the same for payment to the teachers. If that is the ordinary procedure contemplated under he Act and Rules, it only means that the Management has got the absolute control over the teachers. It cannot be disputed that the payment of salary is one of the acts of management and general administration. The Management may not have any right to get a grant, but the right to pay the salary is only with the Management, unless special circumstances are made out."

18. From the above, it is clear that when the statute has given specific power to the college committee to take disciplinary proceedings which includes other incidental proceedings against a teacher, respondents 1 and 2 cannot insist the college committee to pass a particular order preventing the teacher from attending the college in view of the fact that their names find place in the list of arrested persons and persons against whom F.I.R., was filed. If the action of the 2 nd respondent is approved, then it amounts to allowing the 2nd respondent to interfere with the functions of the college committee, which alone is empowered under Sec.14(1)(c) of the Act to take disciplinary proceedings against a teacher, especially when the Principal-in charge had satisfied with the explanation given by the petitioners and revoked the order of suspension passed earlier. If at all, the 2nd respondent could ask the college committee to take appropriate action in accordance with law, against the petitioners. If the 2nd respondent gives a direction to pass a particular order, then the college committee which is empowered under the Act to deal with the matter cannot be expected to apply their mind and so it amounts to violation of the principles of natural justice.

19. Though under Sec.7 of the Act 36/2002 disciplinary action may be taken, but by Ordinance 3 of 2003, the said Section was omitted and new Sec.7 is substituted by which it was made applicable only to the Government servants and not to other servants. So, disciplinary action cannot be taken by the government against the petitioners under Act 36 of 2002 as amended by Ordinance 3 of 2003.

20. In view of the above discussion, the impugned orders passed by the 2nd and 3rd respondents cannot be sustained and they are set aside. These writ petitions are allowed. No costs. W.P.M.P.Nos.30226, 3 0230 and 30231of 2003 are closed.

Index:Yes
Internet: Yes

To
1.The State of Tamil Nadu
Rep., by the Secretary to Govt.
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2.The Director of Collegiate Education,
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sks